NO. 94-1584

SUPREME COURT U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

NANNY CAY ENTERPRISES, LTD.,
(PREVIOUSLY C.D. HUNTER ASSOICAITES),
CARIBBEAN MARINE CENTER, LTD. and their
subsidiary NANNY CAY, LTD.,
B.V.I. PROPERTY MANAGEMENT, NORBERT
LORCK-SCHIERNING and KLAUS WAECHTER,
Petitioners,

v.

BARCLAYS BANK PLC,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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April, 1995

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that the District Court did not abuse its discretion in dismissing this action on grounds of *forum non conveniens*.

2. Whether *certiorari* should be granted to review whether the District Court's factual findings constituted an abuse of discretion, where there is no split of authority among the circuits, and the principles governing dismissals on grounds of *forum non conveniens* are set forth in an unbroken line of decisions of this Court.

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STATEMENT OF THE CASE

The Petition for Certiorari filed herein greatly oversimplifies the posture and misstates the facts of this controversy, which involves, not only the instant action (referred to herein as the "Nanny Cay action"), but also three related actions filed in the District Court of the Virgin Islands (referred to below as the "D&C lender liability action," the "D&C foreclosure action, and the "D&C third party action") and a Chapter 11 petition filed in the Bankruptcy Court for the District of the Virgin Islands.

The instant "Nanny Cay" action involves the construction and financing of the Nanny Cay marina and condominium project in Tortola, British Virgin Islands ("B.V.I."). The corporate plaintiffs, Nanny Cay Enterprises, Ltd., Caribbean Marine Center, Ltd. ("CMC"), Nanny Cay, Ltd., and B.V.I. Property Management, Ltd. (referred to herein collectively and interchangeably as "Nanny Cay") are all foreign corporations organized and doing business solely in the British Virgin Islands ("B.V.I."). The individual plaintiffs, Norbert Lorck-Schierning ("Schierning") and Klaus Waechter ("Waechter"), are residents of Germany.[1]

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[1] Although Waechter claims to divide his time between St. Thomas and his native Germany, he has previously denied in a related District Court proceeding that he is a resident of St. Thomas, (App. 296, 301), filed U.S. tax returns as a non-resident alien, and refused to appear for deposition in a related U.S. Virgin Islands proceeding unless his roundtrip airfare was paid from Frankfurt, Germany. (All Appendix cites are to the Joint Appendix filed with the Third Circuit by the parties herein).

On October 15, 1986, Barclays Bank PLC ("Barclays")[2] agreed to lend CMC $2.25 million, and to extend overdraft privileges of $150,000.00, for construction of a 40 room condominium hotel, marina, and associated facilities, on Tortola, B.V.I. The $2.25 million loan was payable over five years, but the overdraft facility was payable upon demand. (App. 161, 163) CMC's directors, including plaintiff Waechter, executed individual guarantees for the full amount of the $2.4 million debt. (App. 97, 161-2) This loan was closed and administered by Barclays' Tortola branch without any involvement by Barclays' St. Thomas branch.

Pursuant to the terms of the loan, construction draws were released, and checks creating an overdraft were honored, on Tortola by Barclays pursuant to the instructions of CMC's agents and employees. Those principally responsible for authorizing the overdrafts and draws on behalf of CMC were Chuck Hunter, the then-managing director of CMC, Alan Smith, CMC's former architect, and Brian Jackson, CMC's former accountant. (App. 291). All of these key witnesses are residents of Tortola. During this period, the "major players in the development," namely Mr. Waechter and Mr. Hunter, had been visiting the site regularly during this period and should have been aware that substantial cost overruns were accumulating. (App. 392).

By the latter part of 1987, it became apparent that this had become a problem loan, that the Tortola project was suffering construction cost overruns in excess of one million

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[2]Pursuant to Rule 29.1 of this Court, Barclays Bank PLC states that it is a subsidiary of Barclays PLC, a publicly traded corporation organized under the laws of England and Wales. It has no other parent or subsidiary corporations except for wholly owned subsidiaries.

dollars, and that an overdraft well in excess of the allowable amount had accumulated. These overdrafts had been used, not just to finance construction but to finance repairs performed by petitioner Klaus Waechter on his luxury yacht and to repay insider loans to petitioner Schierning. (App. 391, 392). Shortly before the Nanny Cay problem came to light, Barclays underwent a reorganization putting its Tortola office, which previously had reported directly to the New York office, under a regional office located in St. Thomas. Nevertheless, virtually all contacts with the management of the Nanny Cay project, and most notably with director Klaus Waechter, continued to be funneled through Tortola branch manager Brian Sollitt, (App. 369-372, 386, 402-03, 426).

Barclays was prepared to make the additional advances required to complete construction (App. 392), provided the guarantors, including Waechter, either put more equity into the project or posted additional security. Waechter informed Sollitt that he had invested a substantial sum in the U.S. Virgin Islands corporation D&C Development, Inc. ("D&C"), which owned real property on St. Thomas. Waechter proposed to use his stake in D&C, under a variety of schemes, to provide the required additional security for the Nanny Cay project.

Barclays rejected Waechter's first proposal, which was that Barclays accept assignment of a note secured by a second mortgage on the D & C property. This note was payable to a Channel Islands company in which he claimed to have some controlling stake. (App. 371). Next, Waechter proposed that D & C guarantee a portion of the Nanny Cay debt. (App. 389). However, Barclays concluded after investigation that such a inter-corporate guarantee would be unenforceable. (App. 372).

Finally, Waechter proposed that Barclays replace the Bank of Nova Scotia as D&C's primary lender and refinance the existing debts of D & C, including some $832,000.00 in loans made by Waechter and his wife personally to D & C. (App. 372, 396). This proposal was accepted by the bank. On April 20, 1988, the D & C loan was closed in St. Thomas, without any involvement by Tortola personnel, pursuant to D & C board resolutions presented by the Waechters and D & C counsel Rhys Hodge. The loans by the Bank of Nova Scotia and the Waechters were paid from the proceeds. Pursuant to his agreement, Waechter transmitted $650,000.00 to Barclays' Tortola branch to further secure his guaranty of the Nanny Cay indebtedness. In exchange for this posting of additional security, Barclays provided an additional credit facility of $1.2 million to CMC.

The Nanny Cay restaurant, office buildings, marina, and condominium units were completed over the next several months. (App. 402-03, 413-414). However, the Nanny Cay group continued to fail to meet its obligations under the loan agreements with Barclays. Barclays ultimately instituted receivership proceedings in Tortola pursuant to the laws of the B.V.I. See App. 717-25.

Similarly, on St. Thomas, D & C never made a single payment on its 1988 loan from Barclays. On February 12, 1990, Barclays filed the "D&C foreclosure action" in the District Court of the Virgin Islands seeking foreclosure of its lien against the D&C's St. Thomas real property. (App. 295-300) Waechter and D & C answered but asserted no counterclaims. Instead, on April 23, 1990, D & C and the appellants herein separately filed the instant "Nanny Cay" action. Although filed in St. Thomas, this

complaint (App. 837) appears to allege wrongdoing based solely on the alleged mishandling of the Nanny Cay loan by Barclays' Tortola branch, and to allege harm based solely on the Nanny Cay cost overruns. D&C was included as a nominal plaintiff, according to the deposition of Attorney Rhys Hodge, who drafted the complaint, simply out of an abundance of caution, since the two-year statute of limitations was about to run on any claims D&C might have against Barclays. (App. 179).

Because of the inconvenience involved in litigating in St. Thomas over events occurring exclusively in Tortola, Barclays moved to dismiss the instant action on *forum non conveniens* grounds on August 20, 1990, shortly after being served with the complaint. The Court then ordered this motion to be heard on March 25, 1991.

Three days before the scheduled hearing, plaintiffs moved to substitute Joel Holt, Esq., as their counsel. At the hearing, plaintiffs' new counsel requested and was granted additional time to conduct discovery on the *forum non conveniens* issues. During the following eleven months, plaintiffs noticed and conducted a single deposition, and served two separate requests for document production, to which Barclays responded with four separate productions, totalling over fifteen hundred pages (App. 850-57).

Barclays propounded a single request for document production, (App. 846-49) followed by a motion to compel a response to same (App. 835). Plaintiffs responded to neither filing, stating that all relevant documents were in the possession of the receiver controlled by the B.V.I. Court in Tortola (App. 614, 653).

Although unwilling to respond to discovery in St. Thomas, Petitioners herein were quite active in the courts of

the B.V.I. They filed two separate actions against Barclays in Tortola's High Court of Justice, both of which alleged that Barclays breached a duty of care owed to plaintiffs in its management of the Nanny Cay/CMC loan. The action seeking a damage award, and making "lender liability" allegations (App. 698, ¶5), was dismissed voluntarily once Barclays cited its pendency as a reason for dismissal of the instant action. The other, seeking to displace the receiver appointed to manage the insolvent Nanny Cay project, eventually proceeded to trial before Tortola's High Court of Justice, which entered judgment in favor of Barclays on all issues. (App. 473-87, 717-25).

In the instant action, Barclays' motion to dismiss on *forum non conveniens* grounds came on for hearing on February 28, 1992. Significantly, however, by the date of the hearing, Waechter and his new counsel were no longer at the helm of the sole St. Thomas plaintiff, D & C, whose interests had diverged from those of the remaining plaintiffs, who are Petitioners herein.

Waechter set in motion the events that led to his loss of control over D & C shortly after he consented, on behalf of himself and D & C, to entry of judgment in the "D&C foreclosure action" in a form order reviewed and initialed on each page by counsel for Waechter and D & C. On the very day before the scheduled foreclosure sale of the D & C property pursuant to this agreed judgment, D & C filed a Chapter 11 petition in bankruptcy, staying the sale. In response to motions alleging, among other things, mismanagement or misconduct on the part of Waechter and his wife (the "Waechters"), who constituted two of the three members of the D & C board that authorized the 1988 refinancing, the Bankruptcy Court conducted a hearing and

appointed a trustee to manage the D & C estate. The trustee subsequently retained a new attorney to pursue D&C's claims that Waechter had defrauded the corporation, its creditors, and minority shareholders, among other things, by inducing Barclays to make the February, 1988 loan to D&C Development.

At the hearing held in this action on February 28, 1992, in light of this divergence of interests between the foreign plaintiffs and the sole St. Thomas plaintiff, the trustee's attorney moved for severance of D&C's claims, and the motion was granted without opposition. (App. 630, 633). The Court then turned to Barclays' long-pending motion to dismiss the remaining claims on *forum non conveniens* grounds. After extensive colloquy with counsel, the court made findings on the record, and ordered that except for the severed claims, the action would be dismissed for *forum non conveniens*. Plaintiffs appealed this decision. In an opinion dated March 24, 1993, the Third Circuit reversed and remanded to the District Court for more extensive and explicit findings on a number of factors enumerated in its opinion. After remand, Barclays filed a renewed motion to dismiss, addressing through affidavits and other materials the factors identified by the appellate court. This motion was fully briefed and came on for hearing on April 13, 1994 before Judge James T. Giles.

On the very day of the hearing, four years after their complaint was filed, plaintiffs submitted an amended complaint altering dramatically their theory of recovery. The gravamen of the initial complaint was that Barclays "breached its duty of due care and its fiduciary duty to the Plaintiff by improperly releasing and or allowing an overdraft in excess of One Million Dollars ($1,000,000.00)

... " (App. 838). The amended complaint purported to eliminate the question of the unauthorized overdraft by alleging, for the very first time in this litigation, that Waechter and Barclays entered into an oral agreement to restructure the Nanny Cay loans. Under this newly-pleaded oral agreement, Waechter, apparently acting on behalf of both the plaintiff corporations and the individual guarantors of their debts, allegedly ratified the overdraft and agreed not to "challenge the amount of the debt to the bank," including the disputed overdraft balance. (App. 574).

In his colloquy with the Court at the April 13, 1994, hearing, plaintiffs' counsel freely admitted that the purpose of the amendment was to make any evidence regarding the overdraft irrelevant. (App. 79, 96). The Court found that, even taking plaintiffs' new claims at face value, the testimony of the Tortola witnesses regarding the overdrafts would be a critical part of any trial of this action. On April 28, 1994, the District Court entered a Memorandum Opinion and Order making the findings requested by the Third Circuit and dismissing plaintiffs' claims on grounds of *forum non conveniens*. The Third Circuit affirmed this decision without opinion and denied rehearing *en banc*.

Petitioners herein also make reference to the separate "D&C lender liability" action consisting of the severed St. Thomas claims brought by D&C Development's trustee, and claim that "Barclays had filed its own suit in the U.S. Virgin Islands against Mr. and Mrs. Waechter," and that "extensive discovery" has taken place in that suit. Petition at 5. Both

claims are misstatements of the record.[3] Barclays did not come voluntarily as a plaintiff to assert claims against the Waechters in that proceeding. Instead, it was haled into this court as a defendant in the "D&C lender liability" action, which was filed by D&C's trustee in March of 1992, after the District Court severed its claims from the instant action for separate prosecution. In that case, the trustee accused Barclays of aiding and abetting the efforts of Waechter to loot the corporate assets and thereby defraud the minority shareholders and creditors of that defunct corporation. The trustee claimed that Barclays refinanced the corporate debts, including certain insider loans made by the Waechters to the corporation, based on corporate resolutions that were improperly obtained by the Waechters pursuant to a board of directors meeting that never occurred.

For obvious strategic reasons, the trustee did not join as defendants those whose fraud Barclays allegedly aided and abetted, namely the Waechters. So that the fault of all parties alleged to be culpable could be adjudicated in one proceeding, Barclays was forced to join as third party defendants in the "D&C lender liability" action both the Waechters and Attorney Rhys Hodge, D&C Development's attorney who opined that the loan was properly authorized and who claimed that he was present at the board meeting which allegedly never occurred. Barclays sought no affirmative relief, but only contribution or indemnification for any judgment which it might be required to pay. The

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[3]Petitioners also claim that the District Court "did not even discuss" the D&C Development lawsuit. As evidenced by the very opinion appended to their Petition, though, the District Court in fact explicitly discussed this action and found it to involve issues "legally distinct from plaintiffs' Nanny Cay theory against Barclays." Petition, p. 26a, n.1.

District Court referred the action to Bankruptcy Court for treatment as an adversary proceeding.

The discovery conducted in the "D&C lender liability" case did not involve either the Nanny Cay-related overdraft issues raised in Petitioners' original complaint or the oral restructuring agreement issues raised in their amended complaint. Discovery in the "D&C lender liability" suit instead involved allegations that the Waechters engaged in a pattern of looting D&C's corporate assets and defrauding its minority shareholders going back to 1981.

As part of their continuing effort to bring their Tortola-based claims before a U.S. Virgin Islands jury, the Waechters refiled the instant "Nanny Cay" claims as third-party counterclaims in the "D&C lender liability" action. The trustee and Barclays subsequently settled their claims, and the remaining claims were transferred from Bankruptcy Court back to the regular civil docket of the District Court and filed as the separate "D&C third party" action. Barclays was redesignated, somewhat misleadingly, as plaintiff by virtue of its claims for contribution and indemnity. Discovery in that matter has been stayed pending the disposition of the instant "Nanny Cay" action. Barclays has moved to dismiss both the Waechters' counterclaims, which mirror the Nanny Cay-based claims asserted herein, on *forum non conveniens* grounds, and its own contribution and indemnity claims, all without prejudice to refiling in another forum. This motion is fully briefed and ready for decision by the District Court.

REASONS FOR DENYING THE WRIT

I. THE APPELLATE COURT, IN AFFIRMING WITHOUT OPINION, PROPERLY RULED THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THIS ACTION.

The controlling precedent in the Third Circuit[4], which turn derives from a trilogy of cases from this Court,[5] requires courts to look at three groups of factors. As a threshold matter, the court must first determine that an adequate alternative forum exists to hear plaintiff's claims.[6] Next, the Court must weigh and balance a variety of private interest factors.[7] Third, the Court must examine a variety of public interest factors,[8] including the "administrative and legal problems" alluded to in Koster.[9]

In weighing these various factors, there is no rigid rule governing the court's determination.[10] This Court has

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[4]Lacey v. Cessna Aircraft Co., 862 F.2d 38 (3d Cir. 1988) (hereinafter "Lacey I"); Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 618 (3d Cir. 1989) ("Lony I"); Lacey v. Cessna Aircraft Co., 932 F.2d 170 (3d Cir. 1991) ("Lacey II"), and Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604 (3d Cir. 1991) ("Lony II").

[5]Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Koster v. Lumbermans Mutual Casualty Co., 330 U.S. 518 (1947); and Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

[6]Lacey II, 932 F.2d at 180; Piper, 454 U.S. at 254 n. 22.

[7]Piper, 454 U.S. at 257.

[8]Id., 454 U.S. at 257.

[9]Id., 330 U.S. at 524.

[10]Lacey I, 862 F.2d at 43.

repeatedly emphasized the necessity to retain flexibility and to avoid the application of rigid rules.[11] The "ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice."[12] The law is clear that, in reviewing the district court's decision, the appellate court does not perform a *de novo* review of the relevant factors, and may not substitute its judgment for that of the District Court.[13] Its review is limited to consideration of whether the district court abused its discretion. So long as all relevant factors are considered and the Court does not abuse its discretion in making findings, the court's decision must be affirmed on appeal.

In this action, because the district court properly evaluated all factors in this clear cut case, its decision was affirmed summarily. Petitioners do not take issue with the correctness of this three-part legal analysis applied, nor could they since these factors derive from an unbroken line of authority stretching back at least to the 1947 decision in Koster, supra. They do not take issue with the specific factual findings made by the District on each of these three factors, namely, alternate forum, private interest factors, and public interest factors.

Instead, Petitioners first advance a *non sequitur*. Without explaining how their objection fits into this orderly framework for analysis, Petitioners argue that because Barclays, as defendant in the separate "D&C lender liability" action, joined as third party defendants those whose fraud it

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[11]Piper, 454 U.S. at 249-50.

[12]Koster, 330 U.S. at 527.

[13]Piper, supra, 454 U.S. at 237.

allegedly abetted, this somehow shows that the decision of the District Court was an abuse of discretion.[14] The relevance of the "D&C lender liability" and "D&C third party" actions was considered and dismissed by the District Court in an extensive written opinion that the Third Circuit correctly found to constitute a proper exercise of discretion.

Second, Petitioners claim that District Court's careful analysis must be rejected, and the dismissal reversed, because the District Court failed to specify with sufficient particularity the precise level of deference it paid to the forum choice of these foreign plaintiffs. Noticeably absent is any discussion of the fact that all Petitioners, both individual and corporate, are foreign citizens. The law is clear that the forum choice of foreign plaintiffs is entitled to less deference than that of residents who sue in their home forum.[15]

In its first decision dismissing this action, the District Court attributed "great weight" to their choice of forum, but found in light of the many factors favoring dismissal, that their choice was "not controlling." (App. 77-78). This was a greater level of deference than required under controlling precedent. The Third Circuit, in its initial decision remanding this action, requested greater analysis of the claim that a St. Thomas forum would serve the plaintiffs' convenience since "Waechter resides there and because crucial documents and witnesses are located there."[16] The District Court, in an extensive written opinion, analyzed

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[14]Petition at 5-6.

[15]Piper, supra, 454 U.S. at 255-257.

[16]Petition at 13a.

these assertions and found them to be meritless. The Third Circuit correctly found this determination to fall within the Court's broad discretion.

Indeed, Petitioners' objections on this point are controlled by Piper, supra, 454 U.S. at 255-56, where the Third Circuit reversed the grant of a *forum non conveniens* motion, finding that insufficient deference was paid to the forum choice of foreign plaintiffs. This Court in turn reversed the appellate court, holding that the District Court applied the proper legal standard in dismissing the foreign plaintiffs' claims, and did not abuse its discretion.

II. PARTICULARLY SINCE THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS, AND THE PRINCIPLES GOVERNING DISMISSALS ON GROUNDS OF FORUM NON CONVENIENS ARE SET FORTH IN AN UNBROKEN LINE OF DECISIONS OF THIS COURT, CERTIORARI SHOULD NOT BE GRANTED SIMPLY TO REVIEW WHETHER THE DISTRICT COURT'S FACTUAL FINDINGS CONSTITUTED AN ABUSE OF DISCRETION IN THIS PARTICULAR CASE.

It is difficult to glean from their submission precisely why Petitioners believe that this Court should exercise its *certiorari* jurisdiction to review the factual findings of the District Court for abuse of discretion, particularly since the Third Circuit affirmed without opinion. Petitioners do not claim that their petition falls within any of the reasons for exercise of this Court's *certiorari* jurisdiction set forth in Rule 10 of this Court.

Certainly, there is no claim, pursuant to Rule 10.1(a), of conflict among the various United States courts of appeal or the state courts of last resort as to the proper standards to be applied. Neither is there a claim, pursuant to Rule 10.1(c), that in affirming the District Court without opinion the Third Circuit decided an important question of federal law that has not been settled by this Court. Similarly, petitioners do not appear to argue that the appellate court "sanctioned such a departure" from the "accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of judicial supervision," pursuant to Rule 10.1(a).

This Petition, if it claims to fall within any of the accepted categories, must be interpreted to fit within Rule 10.1(c), namely, to allege that the appellate court "has decided an important question of federal law which has not been, but should be decided by this Court." Apparently this is what Petitioners mean to say when they urge this Court to

> grant *certiorari* to clarify the *forum non conveniens* doctrine in light of the expanding field of international law related to business transactions that initiate in the United States but result in activities occurring outside of its borders.[17]

Petitioners advance nothing to show that there is a need for further clarification of the three-part analysis enunciated by this Court in a line of opinions culminating in Piper, supra, 454 U.S. at 255-61. In its essence, petitioners'

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[17]Petition at 8.

chief complaint, repeated three times,[18] appears to be that, in engaging in its orderly analysis, the District Court did not recite the talismanic words, "vexatious, harassing, or inconvenient." This fails to constitute an adequate basis for reversal of the decision below, much less the exercise of *certiorari* jurisdiction.

III. CONCLUSION.

On the merits, the Third Circuit's affirmance, without opinion, of the District Court's carefully crafted, although unpublished, written decision, must itself be affirmed. More important, though, Petitioners have identified no issue worthy of consideration by this Court on writ of *certiorari*. This Court should decline to exercise jurisdiction over this matter.

Respectfully Submitted,

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[18]Petition at pp. i, 8, 9.